



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 7 OF 2014

PATRICK SHIGOGODI SHIKOLI.....CLAIMANT

VERSUS

HASBAH KENYA LIMITED.....RESPONDENT

JUDGMENT

1. Patrick Shigogodi Shikoli (the Claimant) instituted these legal proceedings against Hasbah Kenya Ltd (the Respondent) on 22 January 2014, and he stated the Issues in Dispute as:

Unlawful termination of employment, withheld salary, unpaid leave allowance and underpaid terminal benefits.

2. The Respondent filed a Response on 13 February 2014, and on 30 September 2014, the parties consented to grant of leave to amend their pleadings.

3. The Claimant filed an Amended Memorandum of Claim on 20 April 2015, and the Respondent filed an Amended Response and Counterclaim on 11 June 2015.

4. The Claimant filed a Reply to the Amended Response and Counterclaim on 4 August 2015.

5. The Claim was heard on 3 July 2018, 25 October 2018 when the Claimant's testimony was taken, and 23 May 2019, 30 July 2019 and 2 March 2021 when the evidence of the Respondent's witnesses was taken.

6. The Claimant filed his submissions on 24 March 2021, and the Respondent filed its submissions on 30 April 2021.

7. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

8. The Respondent notified the Claimant of the termination of his employment through a letter dated 13 June 2013. The letter gave the reason for the termination as *misuse of company property*. It also made reference to previous warning letters.

9. Section 35(1)(c) of the Employment Act, 2007 envisages written notice of termination of employment of at least 28 days unless it is a case of summary dismissal.

10. The Respondent did not demonstrate that it gave the Claimant any written notice as contemplated by the aforesaid section as read with section 43(2) of the Employment Act, 2007.

11. Apart from the written notice, section 41 of the Act requires the employer to allow the employee to make representations, preferably accompanied by a colleague.

12. In paragraph 5 of the Amended Response, the Respondent pleaded that the Claimant was informed of the termination of his employment upon reporting to work on 13 June 2013.

13. There was no pleading as to when, where and who granted the Claimant an opportunity to make representations.
14. The Respondent's second witness Feisal Mohammed stated that the Claimant's termination of employment letter was received in Kisumu from head office on 14 June 2013 and that he called the Claimant to collect the letter.
15. Except for the testimony of Mr Mohammed, there was no evidence from any of the three witnesses called by the Respondent on when, where and how the Claimant was afforded an opportunity to be heard.
16. If minutes of such a hearing were kept, they were not produced in Court.
17. The person who authored the Claimant's termination letter was not called to testify.
18. The Court finds that the termination of the Claimant's employment was procedurally unfair.

Substantive fairness

19. In terms of sections 43 and 45 of the Employment Act, 2007, the Respondent had the burden of showing that the reason for the termination of the Claimant's employment was both valid and fair.
20. The reason for the termination of the Claimant's employment was *the misuse of the official vehicle* (use of the vehicle outside the authorised hours without permission).
21. The Claimant, a vans salesman, testified that drivers were allowed to drive the vehicles up to 6.00 pm, but because the salesman was key accounts persons and covered a vast area, sometimes they were allowed to drive outside the prescribed hours. He made reference to a Memo dated 17 May 2011.
22. The Respondent's first witness testified that they were informed through an email in 2011 not to drive the official vehicles beyond 8.00 pm and that the Claimant drove the vehicle assigned to him up to 8.58 pm on 9 June 2013.
23. The witness also testified that any driver who was late had to call and secure approval. A Memo dated 15 October 2011 instructing employees not to use vehicles beyond 8.00 pm was produced, and that authorisation had to be secured for the use of the vehicles beyond that time.
24. The Respondent also produced tracking records of the vehicle assigned to the Claimant to show that he used the vehicle beyond hours.
25. The Claimant had previous warnings in relation to misuse of the Respondent's vehicles beyond hours.
26. The Court is satisfied that the Respondent has proved that the Claimant disobeyed a policy on the use of vehicles beyond hours, and thus the reasons were valid and fair.

Compensation

27. Despite having valid and fair reasons to terminate the Claimant's employment, the Respondent did not follow a fair procedure.
28. The Claimant served the Respondent for about 4-years, and in consideration of the length of service and disciplinary record, the Court is of the view that the equivalent of 2-months' gross salary as compensation would be fair (gross salary was Kshs 54,275/-).

Breach of contract

29. The Claimant admitted that he was paid earned wages and accrued leave days. Nothing turns on these heads of the claim.

Gratuity

30. The Claimant sought Kshs 132,140/- on account of gratuity.
31. The Respondent had paid him Kshs 60,000/-.
32. The contract produced in Court did not provide for payment of gratuity.
33. The Claimant was a contributor to the National Social Security Fund. And by dint of section 35(5) & (6) of the Employment Act, 2007 would not be eligible for service pay.

Counterclaim

34. The Respondent paid the Claimant Kshs 60,000/- as gratuity. It asserted that the Claimant was not entitled to the payment.

35. Gratuity, such as the one paid to the Claimant, was gratuitous as it was not based on the contract. The Respondent cannot turn around and claim what it paid gratis to the Claimant.

Conclusion and Orders

36. The Court finds and declares that the termination of the Claimant's contract was procedurally unfair, and he is awarded:

(i) Compensation **Kshs 108,550/-**

37. Claimant has partially succeeded. Each party to bear its own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 16TH DAY OF JUNE 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant D.O.E. Anyul Advocates

For Respondent Nishi Pandit & Co. Advocates

Court Assistant Chrispo Aura